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Atty. Dkt. No. 040302-0383

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Keisuke WAKABAYASHI

Title: FUEL CELL SYSTEM

Appl. No.: 10/780,767

Filing Date: 2/19/2004

Patent No.: 7,442,454

Grant Date: 10/28/2008

Examiner: John S. Maples

Art Unit: 1795

Confirmation 2070

Number:

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. §1.705

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant respectfully requests reconsideration of the Patent Term Adjustment (PTA) determined for the captioned patent, which issued on 10/28/2008 as U.S. Patent No. 7,442,454.

The Patent Office determined that the patent was entitled to 458 days of PTA. Applicant believes that this PTA determination was made in accordance with the "Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. §154(b)(2)(A)" published at 69 Fed. Reg. 34238 (Jun. 21, 2004). Under that interpretation of the PTA statute, any PTO delay under 35 U.S.C. § 154(b)(1)(A) is deemed to overlap with any 3-year maximum pendency delay under 35 U.S.C. § 154(b)(1)(B), and so, as a practical effect, PTA may be awarded under §154(b)(1)(A) or §154(b)(1)(B), but not both.

On September 30, 2008, the United States District Court for the District of Columbia issued a decision finding that the U.S. Patent and Trademark Office's interpretation of the PTA statute is incorrect. *Wyeth v. Dudas*, Civ. Action No. 07-1492 (JR) (Sep. 30, 2008). The court determined that, under the correct interpretation of the PTA statute, periods of "overlap" are limited to "periods of time . . . [that] occur on the same day." *Wyeth*, slip op. at 8. Thus, a PTO

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delay under §154(b)(1)(A) overlaps with a delay under §154(b)(1)(B) only if the delays "occur on the same day." *Id.*

Applicant has recalculated PTA for the captioned patent under the court's interpretation of the PTA statute, and has determined that the patent is entitled to 710 days PTA, as shown on the attached sheet, which shows the relevant delays under 37 CFR §§1.702(a) and (b), and under 37 CFR §§1.703(a) and (b).

The attached sheet details the circumstances during the prosecution of the application resulting in the patent that constitute a failure to engage in reasonable efforts to conclude processing or examination of such application as set forth in § 1.704.

(a) Total of non-overlapping PTO delay under §154(b)(1)(A) & (B): 818 days

(b) Total Applicant delay: 108 days

Final PTA Determination: 710 days

Applicant therefore respectfully requests that the patent be accorded 710 days PTA.

The patent is not subject to a terminal disclaimer.

Payment of the requisite fee is submitted herewith. Should no proper payment be enclosed herewith, as by a check being in the wrong amount, unsigned, post-dated, otherwise improper or informal or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741.

However, because this PTA error is due to a Patent Office error in interpreting and applying the PTA statute, a refund of the fee is respectfully requested.

Respectfully submitted,

Date NOV 17 2008

By *MD KAMINSKI* 39,370

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Patent Term Adjustment Calculation System

Docket Number: 040302-0383
 Application Number: 10/780767
 Patent Number: 7442454

	Event Description	Event Date	Days from Filing	PTO Days	Applicant Days
Edit Delete	Application Filing Date	02/19/2004	0		
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	09/17/2004	211		
	14 month From Application date	04/19/2005	425		
Edit Delete	Restriction Requirement	11/06/2006	991	566	
Edit Delete	Restriction Requirement Response Received at PTO	12/06/2006	1,021		
Edit Delete	Non-Final Office Action	01/04/2007	1,050		
	3 Year Period Starts	02/19/2007	1,096		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	04/03/2007	1,139		
Edit Delete	IDS under 1.704(c)(8) filed at PTO	06/20/2007	1,217		78
Edit Delete	Final Office Action	06/29/2007	1,226		
	Final Office Action + 3 months	06/29/2007	1,318		
Edit Delete	Final Office Action Response Received at PTO	10/11/2007	1,320		
Edit Delete	Advisory Action	10/11/2007	1,330		
Edit Delete	Request For Continued Examination	10/29/2007	1,348		30
	3 Year Period Stopped	10/29/2007	1,348	252	
Edit Delete	Non-Final Office Action	01/10/2008	1,421		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	01/10/2008	1,512		
Edit Delete	Notice of Allowance	07/23/2008	1,616		
Edit Delete	Issue Fee Paid	09/17/2008	1,672		
Edit Delete	Patent Grant Date	10/28/2008	1,713		
				Totals:	818 108
				PTA:	710

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